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No. 07-582

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,
Petitioners,

v.

FOX TELEVISION STATIONS, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT CENTER FOR CREATIVE VOICES IN MEDIA, INC.

ANDREW JAY SCHWARTZMAN*
PARUL DESAI
**Counsel of Record*
MEDIA ACCESS PROJECT
SUITE 1000
1625 K STREET, NW
WASHINGTON, DC 20006
(202) 232-4300
Counsel for Center for Creative Voices in Media, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent Center for the Creative Community, Inc. d.b.a. Center for Creative Voices in Media, Inc. ("Center") respectfully submits this corporate disclosure statement:

The Center is a nonprofit corporation which does not issue stock. It is not a subsidiary or affiliate of any publicly owned corporation.

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STATEMENT OF THE CASE

1. Respondent Center for Creative Voices in Media ("Center") adopts the Counter Statement of Respondent Fox Television Stations, Inc. as supplemented herein.

2. Respondent Center is an organization dedicated to protecting and promoting the interests of its members, who create and provide artistic content for broadcast programs. The Center's members include writers, producers, actors, authors, and other creative professionals (collectively referred to as "creators").

3. The order here under review has had a substantial effect on the creative community. During the agency's reconsideration of its policies, Respondent Center submitted a white paper describing the impact of the FCC's revised policies upon the day to day activities of writers, producers and directors. This paper, entitled "*Big Chill: How the FCC's Indecency Deci-*

and Harm America's Children." is reproduced for the Court's convenience in the accompanying Addendum.

Creators are at the forefront in the actual process of creating and delivering speech. Although the Commission's enforcement proceedings are directed at licensees, the pressure of stiff indecency penalties is passed on to the artists who actually produce their programming. The inhibiting environment thus created directly interferes with the process of artistic and creative expression.

The constraint generated by the Commission's action affects creators in a number of ways. For example, in some instances, licensees have mandated that creators edit their programming simply as a precautionary measure. 21Add. The inevitable tendency to err on the side of caution means that the impact of the Commission's action is often broader that its plain language would suggest. In other cases, licensees have flatly refused to air certain programming for fear of being subject to complaints of indecent and profane programming. 5Add. Moreover, the vague and confusing nature of the FCC's actions has resulted in uncertainty as to what constitutes "indecent" programming.

Further, the fact that the statutory term "profanity" has never previously been the basis for Commission enforcement, much less given an independent meaning, has caused very widespread confusion in the artistic community. The freedom of creators to express themselves has been stifled because creators are now under a great deal of pressure to speculate as to how far their creativity and expression can reach before it constitutes an actionable complaint. The Commission's *Orders*, therefore, have resulted in a palpable chill on free speech. Without coherent and consistent guide-

lines as to what constitutes indecent and profane programming, creators are literally at a loss for words.

4. Respondent Center's members are also viewers and listeners of television and radio, albeit with a heightened interest in observing and building upon the work of other creators in their industry. Artists, be they painters, writers, playwrights, or television creators, do not work in isolation, but rather within the context of each other's works. Oftentimes, creators build upon or distinguish their work from their peers' works. Thus, a critical aspect of the creative process is to have access to diverse programming, which enables and fosters further creative expression.

5. Respondent Center's members are also "ordinary" viewers and listeners of broadcast programming. In their "off duty" and recreational viewing and listening by themselves and in the company of friends and family, they partake of television and radio just as the rest of the public does. As individual viewers and listeners, they are entitled to expect a diversity of creative expression. Instead, under the current indecency regime, viewers and listeners are being prevented from receiving access to protected speech and expression.

6. The Commission's *Orders* have, without explanation or logic, created an environment where viewers and listeners are prevented from receiving protected expression. Consequently, the *Orders* have interfered with their rights to have access to diverse sources of information, as is guaranteed by the Communications Act. *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 379-380 (1969).

SUMMARY OF THE ARGUMENT

Respondent Center concurs with the government and *Amici Curiae* Free Press, *et al.* and American Academy of Pediatrics, *et al.* that no constitutional questions are properly before the Court at this time.

The FCC's dramatically revised reinterpretation of the law merits lessened deference than is ordinarily afforded to agencies' statutory construction.

The Commission's decisions have created an unworkable, inconsistent, and confusing indecency regime, with vague and arbitrary standards. This is a very substantial departure from prior policy and precedent, for which the government has not offered a reasoned explanation.

As a consequence, creators, as producers of the programming aired by licensees, are directly and immediately impacted. The inconsistency of the FCC's decisions with prior precedent has left creators in a precarious position since they no longer have the ability to determine accurately what type of expression constitutes indecent speech. These actions have thus impermissibly stifled creative expression and caused adverse economic consequences for creators and performers.

ARGUMENT

I. THIS COURT NEED NOT, AND SHOULD NOT, CONSIDER CONSTITUTIONAL QUESTIONS AT THIS TIME.

Respondent Center concurs with the government that no constitutional questions are properly before the Court at this time. Brief for the Petitioners at 42-43. Furthermore, they strongly endorse the arguments of *Amici Curiae* Free Press, *et al.* and American Academy of Pediatrics, *et al.*, which demonstrate that this Court's holding in *Red Lion Broadcasting Co. v. FCC*, 395 U.S.

367 (1969), is not implicated by the FCC's action below or the Second Circuit's review thereof. Brief of Free Press, *et al.* at 6-42; Brief of American Academy of Pediatrics, *et al.* at 4-15.

II. THE FCC'S REVISED INTERPRETATION OF THE COMMUNICATIONS ACT IS NOT ENTITLED TO SUBSTANTIAL DEFERENCE.

While the government acknowledges that the FCC has reinterpreted key provisions of the Communications Act, it insists that "the APA requires only that it 'supply a reasoned analysis for the change.' [*Motor Vehicle Mfrs. Ass'n v.*] *State Farm* [*Mut. Auto Ins. Co.*, 463 U.S. 29,] 42 [(1983)]." Brief for the Petitioners at 21.

This recitation of the applicable standard understates the burden the government must meet in justifying the agency's actions below. The full sentence from which the government extracted the above quotation emphasizes that "an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change *beyond that which may be required when an agency does not act in the first instance.*" *State Farm* at 42 (emphasis supplied). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 n.30 (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981); *General Electric v. Gilbert*, 125 U.S. 143 (1976). As is fully set forth in the brief of Respondent Fox Television Stations, Inc. the FCC's dramatically revised construction of longstanding interpretations is frought with inconsistencies and does not merit high respect from this Court.

III. THE COMMISSION'S ACTION WAS VAGUE AND ARBITRARY.

The court of appeals correctly held that the FCC's actions were vague and arbitrary and failed to provide a reasoned explanation for departing from its own prior precedent. The FCC purports to give "substantial guidance to broadcasters and the public about the types of programming that are impermissible under [the] indecency standard." J.A. 27. However, the Commission's findings are inconsistent and contradict prior precedent. Moreover, the Commission has failed to articulate a rational explanation for its deviation from prior precedent. As a result, rather than being a model of clarity, the FCC's actions have instead left the creative community confused as to what constitutes indecent and profane programming.

For example, in 2003, the Commission overturned years of precedent in holding that an isolated broadcast of the expletive "fuck" during the live broadcast of the Golden Globes Awards show was indecent. *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards," Memorandum Opinion and Order*, 19 FCCRcd 4975 (2004). In coming to its new stance, the Commission stated that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-Word' or a variation thereof in situations as that here." *Id.*, 19 FCCRcd at 4982. Thus, it would have seemed that creators should refrain from ever including in their works "the 'F-Word' or a variation thereof."

However, in 2005, the Commission determined that the repeated use of the same expletive, "fuck," in *Saving Private Ryan*, a work of fiction based on World

War II, was not indecent. *Complaints Against Various Broadcast Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," Memorandum Opinion and Order*, 20 FCCRcd 4507 (2005). According to the Commission, the use of the expletives in this case was justified and "essential to the ability of the filmmaker to convey to the viewers the extraordinary conditions" facing soldiers. *Id.*, 20 FCCRcd at 4512. The Commission found that "the expletives uttered by these men as these events unfold realistically reflect the soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves." *Id.* Thus, it would have seemed that creators could include expletives in their works, so long as the context justified the use.

In the matter under review the Commission appeared to abandon the *Saving Private Ryan* precedent, finding that the use of "fuck" and "shit," a handful of times, in the documentary *The Blues: Godfathers and Sons*, was indecent and profane. J.A. 70-79. In reaching this confusing result, the Commission found that the documentary was "unlike *Saving Private Ryan*, where [the Commission] concluded that deleting offensive words 'would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.'" J.A. 76. To the contrary, the Commission claimed that the educational purpose of the documentary "could have been fulfilled and all viewpoints expressed without the repeated broadcast of expletives." *Id.*

The Commission's action leave creators in the dark as to how a finding of indecency would be avoided

based on the merit of the program. Instead, creators have to rely on the subjective opinion of three Commissioners as to what constitutes merit-worthy programming and hope that their creative works are saved from a finding of indecency. This type of "guidance" is not only arbitrary and vague, but for creators, completely unworkable and unacceptable.

Another example of the effect of the Commission's arbitrary decision making was evident in PBS's attempt to broadcast an appropriate verison of Ken Burns' documentary *The War*. PBS officials attempted to seek guidance from the Commission to determine where they could draw the line with regard to some of the language used in the documentary, but were unable to get such guidance. 21Add. As a result, PBS released two different versions of the documentary because some stations feared Commission sanctions more than others. While PBS was willing to create two versions of *The War*, such vagueness can especially harm less well-known creators, whose work may simply be censored excessively or not even broadcast by stations who fear excessive fines, or the project may simply not be funded. Thus, while a broadcaster's confusion and resulting caution is understandable, its adverse impact on creators is no less unfortunate.

IV. THE COMMISSION'S DECISION IS CHILLING SPEECH AND STIFLING CREATIVE EXPRESSION.

The Commission's action has undermined creators' ability to engage in artistic expression. Additionally, because of the potential for hefty fines, creators and performers have also had to deal with economic setbacks.

A. The *Orders* Have a Significant Impact on Speech and Expression.

Under the unprincipled and arbitrary regime the Commission has enacted, creators have the difficult, almost impossible, task of trying to determine what type of programming the Commissioners will find acceptable. An incorrect decision could lead to hefty fines on broadcasters, and potentially, on creators. Moreover, the enactment of the Broadcast Decency Enforcement Act of 2005 has increased ten-fold the maximum penalty for broacasting obscene, indecent, or profane language, to $325,000. Pub.L. 109-235, 120 Stat. 491 (to be codified at 47 USC § 503(b)(2)(C)(ii). As a result, creative expression has been stifled because creators have been forced to edit, or even refrain from producing, certain programs.

For example, within days of the *Omnibus Order*'s release, acclaimed Emmy and Oscar winning producers Tom Fontana and Barry Levinson received a call from concerned WB Network executives about their pilot episode of *The Bedford Diaries*, a drama focusing on the lives of six contemporary New York City college students. 21Add. The premiere episode, which involved a group of students attending a class on human sexuality, had already been approved by WB's standards and practices department. 21Add. A week before the show was scheduled to air, the network ordered Fontana and Levinson to delete a number of specific scenes, including one that depicted two girls in a bar kissing on a date and another of a girl unbuttoning her jeans. 21Add.

Although Fontana refused to make the edits, the network itself exercised its right to air an edited version of the program. 21Add. WB executives publicly ac-

knowledged that the decision to censor Fontana's new show was entirely driven by concerns raised by the *Order* and that they did not believe the original cut of the episode was indecent. 21Add. Rather, the network says it acted "out of an abundance of caution." 21Add.

B. The *Orders* have Significant Economic Impact on Creators.

The FCC's actions have also have had an adverse economic impact on artists. While penalties are levied on licensees, ultimately it is the creators and performers who suffer the economic consequences of an indecent finding. Indeed, some creators have been forced to indemnify their employers. *See, e.g.*, Frank Ahrens, *Six-Figure Fines for Four-Letter Words Worry Broadcasters*, WASHINGTON POST, July 11, 2006, 2006 WLNR 11941250[1] Some have been forced to invest in indecency insurance policies in the event the Commission at some future date determines a program to be indecent or profane. *Id.* Thus, the findings adopted by the *Orders* put creators at risk not only creatively, but also economically.

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[1]For example, PBS has recently issued new guidelines for producers, including "the producer's warranty that its program complies with all necessary rights, technical requirements and FCC regulations, including the FCC's indecency rules* * * * The obligation to indemnify includes the cost of defending any indecency complaints and the cost of any fines or penalties imposed by the FCC." *See* Karen Everhart, *PBS wards off fines by fixing cartoons from distant past, at* http://www.current.org/fcc/fcc0618indecency.shtml (reproducing PBS guidelines).

V. THE COMMISSION VIOLATED THE RIGHTS OF VIEWERS AND LISTENERS TO ACCESS DIVERSE INFORMATION FROM A DIVERSITY OF SOURCES.

Creators are not the only ones affected by the *Orders*. The Commission's responsibility to ensure that public airwaves are used in the public interest includes the affirmative responsibility to ensure that the listening and viewing public has access to diverse sources of expression. *Red Lion*, 395 U.S. at 390; *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) (Ginsburg, J). However, the *Orders* censor expression that was not considered indecent before and does not provide a reasoned explanation as to the departure from prior precedent. As a result, the listening and viewing audience also suffers because it no longer has access to a wider array of speech.

For example, PBS recently had to face the very real dilemma of whether or not to rebroadcast *Eyes on the Prize*, the Peabody Award-winning documentary on the Civil Rights movement. 23-24Add.; *see also*, John Eggerton, *Washington Watch, Broadcasting & Cable,* 2006 WLNR 17464587; Gail Shister, *Shadow of Censorship Over 'Prize,' Philadelphia Inquirer*, September 20, 2006, 2006 WLNR 16276983. PBS was concerned over generating fines over one F-word used in the documentary. 22Add. Although PBS televised the very same the documentary in 1987 and 1993 without generating any fines, the FCC's new regime leaves doubt whether the documentary could now be considered indecent or profane.

Prior to the FCC's revised interpretation, creators had far greater certainty about how far they could push the envelope, and through their expression, they

could challenge and inspire other creators who viewed their work. However, the uncertainty surrounding the Commission's action denies creators the flexibility to express themselves due to the pressure and possibility of incurring fines for alleged indecent programming. As a result, creators may be unwilling to produce compelling or thought provoking programming, instead playing it safe with generic programming. Thus, as viewers, creators are now handicapped in their ability to receive such compelling or thought-provoking expression that would then allow them to build on or challenge such expression.[2]

CONCLUSION

For all these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

Andrew Jay Schwartzman
Parul Desai
Media Access Project
Suite 1000
1625 K Street, NW
Washington, DC 20006
(202) 232-4300
Counsel for Center for Creative Voices in Media, Inc.

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[2]Moreover, the limits on permissible expression also harm "ordinary" viewers. These viewers are entitled "to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion*, 395 U.S. at 390.